

STATEMENT OF THE CASE

Defendant-Appellant David Earl Dragon appeals the denial of his request to file a belated appeal.

We affirm.

ISSUE

Dragon states the issue as: “Whether the trial court erred in denying defendant’s VERIFIED PETITION FOR LEAVE TO FILE BELATED NOTICE OF APPEAL.”

FACTS

On the 21st day of August 1990, Dragon entered a guilty plea to the Class A felony of child molesting. The plea agreement contained the following provision:

At the time of the taking of the guilty plea and again at the time of the Defendant’s sentencing, the State will make no recommendation as to the sentence to be imposed on the Defendant except as follows: Defendant to be sentenced to the Department of Correction for Fifty (50) years; Fine and costs left to the discretion of the Court.

The trial court accepted the guilty plea on the 27th of September 1990, and sentenced Dragon to fifty years in the Department of Correction.

The trial court at the hearing on the guilty plea asked Dragon whether he understood that if he went to trial and was found guilty he would have a right to appeal the result and that by pleading guilty he was giving up that right. Dragon replied in the affirmative. Additionally, Dragon signed the written copy of the plea agreement.

Dragon filed a *pro se* post-conviction motion in May 1999, with the State Public Defender’s office entering its appearance shortly thereafter. Dragon was later allowed to

withdraw his petition for post-conviction relief without prejudice. In May, 2005, Dragon received a letter from the Public Defender's office, which said:

On the other hand, you can try to challenge your sentence. Under the Indiana Supreme court's decision in *Collins v. State*, 817 N.E2d 230 (Ind. 2004), a defendant must challenge the validity of a sentence imposed following a plea of guilty in a direct appeal or a belated direct appeal under Post-Conviction Rule 2. The time for filing a direct appeal in your case has long passed. Therefore, if you want to challenge your sentence, you will need to pursue a belated appeal under Post-Conviction Rule 2.

Dragon filed his motion for the appointment of local counsel to pursue a belated appeal; however, this motion was denied. After a series of related motions over the next few months were filed, the trial court subsequently denied Dragon's motion for leave to file a belated appeal. This appeal follows.

DISCUSSION AND DECISION

We perceive that the essence of the issue raised by Dragon is that he was not advised of his purported right to challenge his sentence when he entered his guilty plea in September 1990.

Dragon's reliance on *Collins* is misplaced. A person who pleads guilty is not permitted to challenge the propriety of that conviction on direct appeal. However, a person who pleads guilty is entitled to contest on direct appeal the merits of a trial court's sentencing decision where the trial court has exercised sentencing discretion, i.e. where the sentence is not fixed by the plea agreement. 817 N.E.2d at 231.

Dragon was not sentenced under an open plea agreement where the sentencing judge was given discretion in setting the sentence. Dragon was sentenced to the fifty

years called for in the plea agreement. There was no discretion involved in the trial court's sentencing.¹

CONCLUSION

The trial court did not err in denying Dragon's motion for a belated appeal. Judgment affirmed.

BAKER, C.J., and DARDEN, J., concur.

¹ Discretion was given to the trial judge insofar as assessing costs and fines were concerned; however, no ruling was made on these two items, all of which accrues to Dragon's benefit